

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1499

To be argued by
DAVID PATTERSON

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-1499

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSE ANTONIO MANZUETA,

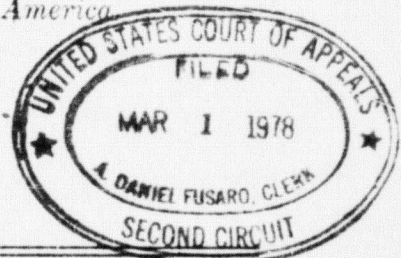
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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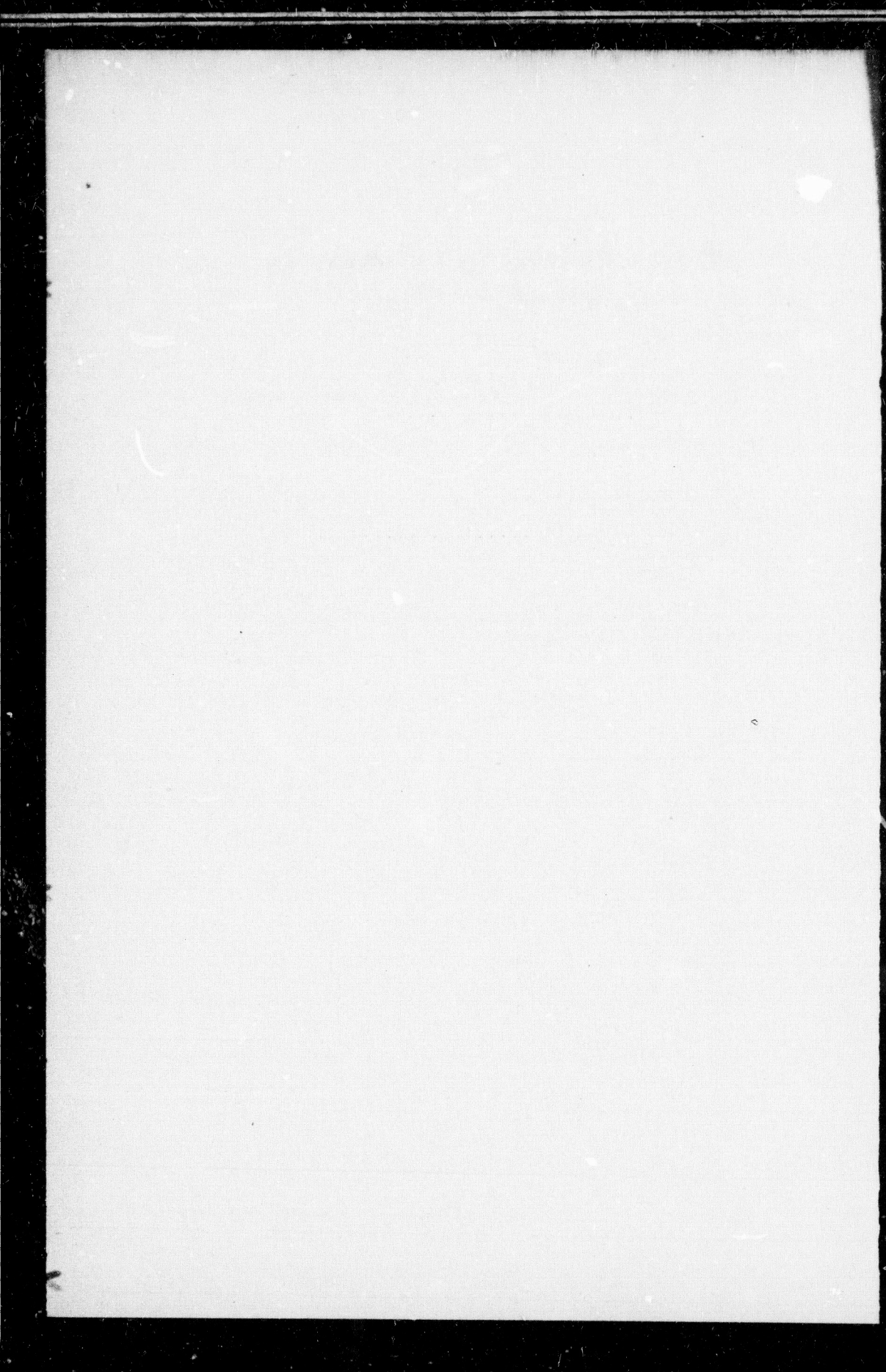
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UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSE ANTONIO MANZUETA,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement:

Jose Antonio Manzueta appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on September 23, 1977, after a three day trial before the Honorable Frederick vanPelt Bryan and a jury.

Indictment 75 Cr. 1045, filed in one count on October 31, 1975, charged Manzueta with possessing and attempting to pass a counterfeit fifty dollar (\$50.00) United States Federal Reserve Note in violation of Title 18, United States Code, Section 472.

Following Manzueta's plea of not guilty and his subsequent disappearance, a bench warrant was issued for his arrest on January 30, 1976. Manzueta was arrested by New York City Police on April 1, 1977, and appeared

the following day before a United States Magistrate in the Southern District of New York. A trial date of September 20, 1977, was ultimately set.

At the start of trial Manzueta made several oral suppression motions. A hearing was held on these motions on the morning of September 20, 1977. All of the motions were denied and a jury trial began on the same afternoon. The trial continued the following day, and after a one day recess, concluded on September 23, 1977, with the jury returning a verdict of guilty.

On November 9, 1977, Manzueta was sentenced to three and half years' imprisonment, all but six months of which was suspended, with three years of probation to begin after confinement.

The defendant is presently serving his sentence.

Statement of Facts

Manzueta was charged with passing a counterfeit fifty dollar bill in a liquor store. The principal evidence against him consisted of the bill in question and the testimony of the liquor store employee to whom the bill was passed. This employee, Angelo Mimms, testified to a number of things which Manzueta said and did while he was still in the liquor store and before the police arrived, all of which strongly indicated Manzueta's guilty knowledge of the counterfeit nature of the bill. See The Trial, *infra*.

Also introduced against Manzueta were two additional counterfeit fifty dollar bills found in his car shortly after his arrest, and certain post-arrest statements, which were principally false exculpatory statements. It was to these

bills and post-arrest statements that Manzueta's suppression motions were directed. He raises no issue on appeal as to the bills, claiming only that reversal is required by Judge Bryan's failure to suppress the statements.

A. The Suppression Hearing

There were three sets of post-arrest statements sought to be suppressed: (1) statements made to New York City Police Officer Samuel Mercado, who interviewed Manzueta shortly after he had been arrested on Saturday afternoon, July 5, 1975; (2) statements made to Special Agent John Simon of the United States Secret Service, who interviewed Manzueta the following Monday morning; and (3) statements made to an Assistant United States Attorney later the same day. The stated grounds for suppression of each set of statements were violations of the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966). (Tr. 2, 6, 11).*

At the hearing on Manzueta's motion to suppress, the Government called four witnesses to testify to the circumstances of the taking of the statements, as well as the seizure of the two additional bills. Police Officer John Garvey, the arresting officer, recounted that on July 5, 1975, at about 12:50 p.m., he responded to a call from Small's Liquor Store located on Eighth Avenue between 154th and 155th Streets in Manhattan. There he found Manzueta and Mimms, who informed him that Manzueta had attempted to pass the counterfeit bill in payment for a quantity of liquor. Mimms told Garvey that upon being confronted with the fact that the bill was counterfeit, Manzueta had offered him (Mimms) a sum of money to

* References prefixed "Tr." are to the hearing and trial transcript. References prefixed "GX" are to the Government's Exhibits at trial.

let him leave the store. Garvey took custody of the bill in question, and, after determining that it was in fact counterfeit, arrested Manzueta and transported him to the 32nd precinct station house located on 135th Street between 7th and 8th Avenues. Garvey did not interview Manzueta, as Manzueta claimed to speak no English, and Garvey spoke no Spanish. (Tr. 12-20).

At the station house, Manzueta was searched and then interviewed by a Spanish speaking New York City Police Officer, Samuel Mercado. Mercado testified that he began the interview by reading Manzueta his rights from a printed arrest form. The form, which was printed in English, was translated by Mercado into Spanish. It contained all the rights enumerated in *Miranda v. Arizona*, *supra*, followed in each instance by the question, "Do you understand?", and followed at the end by the question "And now that I have advised you of your rights, are you willing to answer questions without an attorney present?" * Mercado testified that he read Manzueta everything that was printed on the form, and that after each right Manzueta acknowledged in Spanish that he understood. (Tr. 27-34).

Mercado then asked Manzueta where he had obtained the counterfeit fifty dollar bill. Manzueta replied that he had been a passenger in a taxicab and had been given the bill by the driver. Manzueta was also asked about a set of car keys and a car registration that were found on him. The car to which these belonged was in fact a gypsy taxicab that was later found parked across the street from the liquor store. It was in this car that the two additional bills were found. When questioned about

* An arrest form, not identical to the one actually used by Mercado but bearing the same advice of rights language, was introduced as GX 15.

the keys and registration, however, Manzueta told Mercado that the car to which they belonged was under repair in a garage, and nowhere near the liquor store. (Tr. 35-36).

Mercado also testified at the suppression hearing concerning the discovery of the two additional bills. He stated that after interviewing Manzueta he took the keys and registration and went with Police Officer James Cullen to look for the car to which they belonged in the vicinity of the liquor store. They found the car, a gypsy cab, parked opposite the store. They searched it, and discovered under the back seat the two additional fifty dollar bills. (Tr. 36-42; GX 2, 3).

On cross examination, Manzueta's attorney probed Mercado's proficiency in Spanish. Mercado testified that his Spanish was "adequate to converse with the defendant and advise him of his rights." (Tr. 43). He stated that he knew Spanish "as a matter of my background." (Tr. 43). Manzueta's attorney then asked Mercado to translate several specific English words into Spanish. Mercado was unable to give Spanish translations of the words "appellate" and "amendment." Declining the Government's suggestion that Mercado simply be asked to translate the printed rights form into Spanish, Manzueta's attorney then asked Mercado to translate the word "waiver" into Spanish. Mercado's Spanish translation was translated back into English by the court interpreter as "You have the right not to take your rights." (Tr. 44-45). Mercado was then asked to translate the sentence, "You have the right to consult an attorney before speaking to the police," which sentence he translated accurately. (Tr. 45-46). He was then asked to translate the sentence, "If you cannot afford an attorney, one will be provided to you without cost." This he also did, but gave an improper Spanish translation of the word "appoint." (Tr. 46).

However, Mercado was not sure that he had used the word "appoint" or its Spanish translation at all. (Tr. 46). He testified that in general he felt that he "communicated . . . very well with the defendant in Spanish," and that Manzueta "did understand his rights at the time they were given to him." (Tr. 45).*

* Mercado's complete cross-examination on this subject was as follows:

Q. Your conversation with the defendant was in Spanish?

A. Yes.

Q. Entirely?

A. Entirely, yes.

Q. This was at the behest of Officer Garvey who stated to you that he had problems communicating with the defendant, was that correct?

A. Yes.

Q. Your knowledge of Spanish was adequate to converse with the defendant and advise him of his rights, is that also correct?

A. Yes.

Q. You studied Spanish or speak it as a matter of your background?

A. I speak it as a matter of my background.

Q. You were born in New York?

A. No.

Q. Where were you born?

A. Puerto Rico.

Q. At what age did you come here?

A. Six months.

Q. If I asked you for instance what the Spanish word for appellate is, can you tell us?

A. No.

Q. If I asked you what the Spanish word for—

A. Excuse me. I'm sorry. I could not tell you the word in Spanish but I can tell you what it means in Spanish.

Q. Do you know how to translate "amendment" into Spanish?

A. No.

Q. How would you say waiver in Spanish?

[Footnote continued on following page]

The Court: Madam Interpreter, would you be good enough to translate what this witness says, what he's now about to say in Spanish into English?

Mr. Patterson: May I suggest that the witness be asked to read and translate into Spanish what is written at the bottom of that exhibit. It might be the simplest way.

The Court: I'll allow Mr. Figueroa to proceed along these lines. What was the question?

Q. What is the Spanish word for waiver?

A. Is the word waiver here?

Q. My question to you, how do you translate the word waiver as for instance waiver of rights into Spanish? (Witness speaks in Spanish)

Interpreter: You have the right not to take your rights.

Q. Is that translation pretty much exact?

A. Pretty much, yes.

Q. That you have the right not to take your rights?

A. It's pretty much it, yes.

Q. Is that what you told the defendant on July 5, 1975?

A. I don't recall.

The Court: Was there any change in your Spanish translation as to the rights you give him at various times?

The Witness: No, your Honor. I feel that I communicated myself very well with the defendant in Spanish. I gave him the rights, translated the rights in Spanish to the defendant, and he understood those rights. I feel that I read them, I translated them from this form, and I did a good job at it. The defendant did understand his rights at the time that they were given to him.

Mr. Figueroa: If the Court please, I'm a little troubled deciphering the print on this.

(Pause).

Q. For instance, again, may we have the translator translate?

The Court: Madam Translator, be good enough to translate anything the witness says in Spanish.

Q. For instance, how would you say, officer, in Spanish, you have the right to consult an attorney before speaking to the police?

(Witness speaks in Spanish).

Interpreter: You have the right to talk to a lawyer before you talk to the police.

[Footnote continued on following page]

The Government's third witness at the hearing was Special Agent Harry Horton of the United States Secret Service. Horton testified that on the afternoon of July 5th he went to the 32nd precinct station house to take Manzueta into Federal custody. After conferring with the police officers and receiving the three counterfeit bills from them, Horton transported Manzueta to the Man-

Q. How would you translate, if you can not afford an attorney one will be provided to you without cost?

(Witness speaks in Spanish.)

Interpreter: If you don't have the money to pay for a lawyer—there is no such word as "apanta".

The Witness: I'm not sure whether I used that word at all. I used it now. I stated to him—you want me to say that again in Spanish?

The Court: Please.

(Witness speaks in Spanish.)

Interpreter: You have the right—

The Witness: Which one was that, counsellor?

Q. If you cannot afford an attorney one will be provided to you without cost.

(Witness speaks in Spanish.)

Interpreter: If you don't have the money for a lawyer—

Q. You used the word "apuntara." For the record would that be spelled A-P-U-N-T-A-R-A?

A. I guess so.

Interpreter: Aponta in Spanish means to appoint. One would be given to you. That means I will be to appoint. That would be translating from the English to the Spanish that way.

Q. Is your Spanish better today than it was a couple of years back?

A. No.

Q. After each of the warnings listed on the arrest report did you do anything further?

A. I asked the defendant did he understand.

Q. How many warnings are there on this form, do you recall?

A. No, I don't.

Q. Did you take Spanish up in school also, officer?

A. No, I didn't.

hattan Field Office of the Secret Service located in the World Trade Center. Manzueta arrived there at about 5:00 p.m. He continued to indicate that he spoke no English. As neither Horton nor any other available Secret Service Agent spoke Spanish, Manzueta was photographed and fingerprinted but not interviewed. He was then lodged until Monday morning at the Federal House of Detention on West Street. (Tr. 54-58).

The following Monday morning, July 7th, Horton picked Manzueta up at the House of Detention and took him to the Secret Service Field Office. There, at about 10:45 a.m., Manzueta was interviewed by a Spanish speaking Special Agent, John Simon, who was the Government's last witness at the suppression hearing. Simon testified that he began the interview by reading from, and having Manzueta read to himself, an advice and waiver of rights form printed in Spanish. Manzueta then signed the form in two places, to indicate that he understood his rights and also waived them. (Tr. 62-63, 74-77; Defendant's Exhibit B). Following Manzueta's waiver of his rights, he stated to Simon that he had been the *driver* of a gypsy cab, and had received the bill from a *passenger*, rather than the other way around, as he had stated to Mercado. Simon then pressed Manzueta for information about this passenger. Manzueta said he knew him, but could not give an accurate address or description. (Tr. 246-51).

The third set of statements sought to be suppressed were made by Manzueta during an interview on the same day in the Office of the United States Attorney. It was stipulated that the conversation between Manzueta and the interviewing Assistant United States Attorney was accurately translated by the Spanish-English interpreter who was present, and that it was accurately recorded on a form used by the Assistant for that purpose. This

form revealed that Manzueta was fully advised of his rights at the outset of the interview. When he was advised of his right to an attorney, he stated "Yes, he [sic] would like a lawyer." The following interchange then took place:

Q. Would you like to answer some questions about your background? You may pick and choose those questions you wish to answer, and you may stop at any time.

A. Yes, I'll answer those questions.*

*The complete text of the warning and waiver stage of the interview with the Assistant United States Attorney was as follows:

Q. My name is Robert Costello. I am an Assistant United States Attorney. You have been arrested for a violation of 18 U.S.C. § 472 which relates to possession of counterfeit money. In a few minutes you will be taken before the United States Magistrate who will fix bail in your case. Do you understand that?

A. Yes.

Q. You have a constitutional right to refuse to answer any of my questions. Do you understand that?

A. Yes.

Q. You have an absolute right to remain silent, and if you choose to answer any questions, any statement you do make can be used against you in a court of law. Do you understand that?

A. Yes.

Q. You have a right to consult an attorney and to have that attorney present during this interview. Do you understand that?

A. Yes.

Q. If you do not have funds to retain an attorney, an attorney will be appointed to represent you and you do not have to answer any questions before this attorney is appointed and you can consult with him. Do you understand that?

A. Yes, he would like a lawyer.

Q. Would you like to answer some questions about your background? You may pick and choose those questions you wish to answer, and you may stop at any time.

A. Yes, I'll answer those questions.

There followed a series of questions concerning Manzueta's background or "pedigree" (name, age, address, family, employment, citizenship status, etc.), the answers to which Manzueta sought to suppress. Only four of these answers were actually admitted at trial. See *The Trial*, *infra*. At the conclusion of the background questions, the interview ceased. There was no questioning of Manzueta about the counterfeit bills. (Tr. 68-70, 72; Defendant's Exhibit C.).

Manzueta called no witnesses at the suppression hearing. His attorney argued at the close of the hearing (1) that the statements to Mercado should be suppressed because Mercado could not have adequately advised Manzueta of his rights in Spanish; (2) that the statements to Simon should be suppressed because Simon did not ask after each individual right advisement whether Manzueta understood; and (3) that the statements to the Assistant United States Attorney should be suppressed because they were taken after Manzueta expressed a desire for an attorney. (Tr. 85-87).

Judge Bryan denied the first two motions without elaboration.* In denying the third, he ruled that the question was governed by *United States ex rel. Hines v. LaVallee*, 521 F.2d 1109 (2d Cir. 1975), *cert. denied*, 423 U.S. 1090 (1976), because the statements involved "biographical material," had "nothing to do with the crime," and were not obtained by "any investigatory practice in violation of the *Miranda* rule." (Tr. 92-93).

* The Court's ruling was as follows:

"As I see it there are four various items to which the defendant's motion is directed. One of them, mentioned first by the defendant, is the material, the answers given by the defendant to inquiries by Agent Simon after Agent Simon had given the defendant the *Miranda* warnings. I deny that motion to suppress.

"Then there is the second, the examination by Police Officer Mercado in the Precinct in the Bronx. That also I deny. I deny that motion to suppress." (Tr. 92).

B. The Trial

At trial the Government's principal witness was Angelo Mimms, the liquor store employee to whom Manzueta had attempted to pass the counterfeit fifty dollar bill. Mimms testified that when Manzueta presented the bill, he (Mimms) realized it was counterfeit, confronted Manzueta with this fact, and locked the door to prevent Manzueta from leaving. In the interchange that followed, according to Mimms, Manzueta first explained that he had received the bill from a "numbers man." When Mimms did not accept this statement, Manzueta offered Mimms \$200 to let him leave the store. When Mimms refused, Manzueta attempted to break out of the store by force—sufficient force to require Mimms to restrain Manzueta with a football-type block that drew blood from Manzueta's nose. Mimms held Manzueta in the store until the police arrived. (Tr. 107-15, 147).

Police Officers Garvey and Mercado testified substantially as they had at the hearing concerning Manzueta's arrest and the events thereafter. (Tr. 149-57, 166-70).^{*} Through Mercado the Government introduced, as false exculpatory statements tending to show consciousness of guilt, Manzueta's statements to Mercado that he had been the driver of a gypsy cab, and received the bill from a passenger, and that the car to which the keys and regis-

^{*} On cross examination Mercado's fluency in Spanish was again probed. He testified that his "hispanic roots" were "different from Manzueta's" (Tr. 172), that he had learned Spanish principally in New York, that his accentuation was different from Manzueta's, (Tr. 174), and that he sometimes used Spanish translations that were "literal" but not correct. (Tr. 177-78). On redirect Mercado testified that his parents spoke Spanish at home when he was a child, and that he had no difficulty communicating in Spanish with Manzueta, even though his own Puerto Rican origins were different from Manzueta's. (Tr. 180-81).

tration belonged was under repair, nowhere near the garage. (Tr. 166-70).

James Cullen, the police officer who had actually found the two bills in the car, testified to the details of the discovery. (Tr. 182-84).

Special Agent Horton also testified substantially as he had at the hearing concerning the events of Saturday afternoon and Monday while Manzueta was in federal custody. No statements were introduced through Horton. He did give his expert opinion that all three fifty dollar bills were counterfeit, and, in fact, came from the same counterfeiting offset negative. (One of the bills found in the car was identical to the passed bill even to the serial number). (Tr. 194-98, 208-22).

Finally, Agent Simon testified concerning his interview of Manzueta on Monday morning. Through Simon the Government introduced, also as false exculpatory statements, Manzueta's statements that he had been a passenger in the cab and had received the bill from the driver, and that he knew the driver but could not give an address or detailed description. (Tr. 246-51).

Of the statements made in the office of the United States Attorney, the following were introduced by the Government at trial by way of a stipulation: (1) that Manzueta's date of birth was June 10, 1946; (2) that his address was 860 East 61st Street, Bronx, New York; (3) that his wife's name was Milady Rodriguez; and (4) that he had driven a gypsy cab since January of 1975.*

* Manzueta's age was introduced to rebut any claim of youthful naivete. His address and the name of his wife were offered to confirm Manzueta's ownership of the car in which the bills were found. This car was registered in the name "Milady Rodriguez," at Manzueta's own address. The fact that Manzueta had been driving a cab for a year and a half at the time of the incident was offered to show a likelihood that Manzueta spoke English and was familiar with counterfeit currency.

Manzueta presented no evidence at trial.

ARGUMENT

POINT I

The District Court Did Not Err In Refusing To Suppress Manzueta's Statements To Police Officer Mercado And To The Assistant United States Attorney.

On appeal, as in the District Court, Manzueta bases his claims for suppression of the statements to Police Officer Mercado and to the Assistant United States Attorney on *Miranda v. Arizona*, 384 U.S. 436 (1966). He claims that the statements to Mercado were illegally obtained because Mercado was unable to convey the *Miranda* warnings in Spanish. He also claims that the pedigree statements to the Assistant United States Attorney should have been suppressed because they were elicited after Manzueta had asked for an attorney.

A. The Statements to Mercado.

Judge Bryan made no specific findings of fact when ruling on the statements to Mercado. He simply denied the motion to suppress summarily. However, since the only basis offered for the motion was Mercado's alleged failure to translate the warnings adequately, and since such a failure would seemingly warrant suppression, it is clear that Judge Bryan's summary denial encompassed a factual finding adverse to Manzueta on this point. See *United States v. Duvall*, 537 F.2d 15, 22-23 (2d Cir. 1976); *United States v. Vickers*, 387 F.2d 703, 706 (4th Cir. 1967), *cert. denied*, 392 U.S. 912 (1968).*

* In *Duvall*, this Court was also faced with a claim of ineffective waiver of *Miranda* rights, and with only a "general ruling" by the District Court in the Government's favor. The

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Judge Bryan's implicit conclusion that the defendant was in fact effectively advised of his rights, far from being "clearly erroneous," * is overwhelmingly supported by the record. Mercado testified that he was able to speak Spanish, that he derived this ability from his

Court ruled that "implicit" in the general ruling were several more specific findings: that the defendant's will had not been overborne by physical mistreatment at the time of arrest, that the same was true of a strip search of the defendant, and that an alleged threat against the defendant had either not occurred or been dissipated in effect. 537 F.2d at 20, 23.

A similar approach was taken by the Court of Appeals for the Fourth Circuit in *United States v. Vickers*, *supra*. There the defendant had moved at trial to suppress certain evidence on the ground of an unlawful search. The Government's witnesses had testified that there was consent. The District Judge had denied the motion, but had found no facts. The Court of Appeals ruled that the denial "amount[ed] to an adoption of the facts" as testified to by the Government's witnesses. In this case, Judge Bryan's denial of the suppression motion clearly constituted an adoption of Mercado's testimony that: "I communicated myself very well with the defendant in Spanish," and "[t]he defendant did understand his rights." (Tr. 45).

* The standard of review applied in *Duvall*, and applicable here as well, is that the District Judge's findings are to be upset only if they are "clearly erroneous." 537 F.2d at 23. See also *United States v. Zamarripa*, 544 F.2d 978, 981 (8th Cir. 1976), *cert. denied*, 429 U.S. 1111 (1977) (District Court's findings of effective *Miranda* waiver not "clearly erroneous"); *United States v. DiGilio*, 538 F.2d 972, 985-86 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977) (District Court's determination of voluntariness under 18 U.S.C. § 3501 not "clearly erroneous"); *United States v. Boston*, 508 F.2d 1171, 1175 (2d Cir. 1974), *cert. denied*, 421 U.S. 1001 (1975) (District Court's finding of effective *Miranda* waiver, despite refusal to sign express waiver, not "clearly erroneous"); *United States ex rel. Fitzgerald v. LaVallee*, 461 F.2d 601, 604 (2d Cir.), *cert. denied*, 409 U.S. 885 (1972) (District Court's finding of involuntariness of guilty plea not "clearly erroneous"); *United States ex rel. Coleman v. Mancusi*, 423 F.2d 985, 987 (2d Cir.), *cert. denied*, 400 U.S. 842 (1970) (District Court's finding of voluntariness in constitutional sense not "clearly erroneous").

Puerto Rican background, and that he had no difficulty communicating in Spanish with Manzueta. The conversation between the two was not confined to the advice of rights. Mercado testified that after each right was recited, Manzueta replied that he understood; that Manzueta was then questioned about the counterfeit bill and gave an explanation for it; that Manzueta was also questioned about the car registration and keys found on him; that he gave an explanation for these also; and that all this conversation took place in Spanish.

Nor was there any testimony to contradict Mercado's assertion that the rights were effectively communicated. Manzueta did not testify, or even file an affidavit in support of his suppression motion stating that the warnings had been ineffectively translated. He relied, and still relies, solely on the cross-examination of Officer Mercado. In the course of that cross-examination Mercado was unable to translate or had difficulty translating several rather technical words that did not appear on the advice of rights form ("appellate," "amendment," "waiver"). However, he easily translated the more relevant sentence, "You have the right to consult an attorney before speaking to the police," and when asked to translate the right of an indigent to free legal assistance, he encountered difficulty only with the word "appoint," which he was not sure that he had used at all.

Judge Bryan need not have found, of course, that the rights were translated to Manzueta precisely as they were printed on the form. This Court has repeatedly held that "the words of *Miranda* do not constitute a ritualistic formula which must be repeated without variation in order to be effective. Words which convey the substance of the warning along with the required information are sufficient." *United States v. Vanterpool*, 394 F.2d 697, 698-99 (2d Cir. 1968). See also *United States v. Floyd*,

496 F.2d 982, 988 (2d Cir.), *cert. denied*, 419 U.S. 1069 (1974); *United States v. Massimo*, 463 F.2d 1171, 1173-74 (2d Cir. 1972), *cert. denied*, 409 U.S. 1117 (1973); *United States v. Lamia*, 429 F.2d 373, 375-77 (2d Cir.), *cert. denied*, 400 U.S. 907 (1970).*

Even assuming *arguendo* that Judge Bryan erred in admitting the statements to Officer Mercado, the error was clearly harmless, for the evidence against Manzueta was otherwise "overwhelming." See *Harrington v. United States*, 395 U.S. 250 (1969); *Chapman v. California*, 386 U.S. 18 (1967); *United States v. Sanchez*, 422 F.2d 1198, 1201 (2d Cir. 1970). Cf. *United States v. Corey*, Dkt. No. 77-1308, slip op. 585, 589-90 (2d Cir., Nov. 30, 1977). Manzueta's possession and attempted passing of the counterfeit bill were never disputed. The sole issue at trial was that of guilty knowledge. Manzueta's false exculpatory statements to Mercado—that he had received the bill from a cab driver, and himself owned a car that was nowhere near the liquor store—were admitted to show consciousness of guilt, which bore on his guilty knowledge. In view of the independent evidence of such knowledge, however, the statements were relatively insignificant. The principal evidence on the issue of guilty knowledge was the testimony of Mimms, the liquor store attendant, that when Manzueta was challenged about the bill, he first explained that he had received it from a "numbers man," then tried to bribe Mimms to let him leave the store, and

* Even if Mercado had found it necessary to resort to an English word or phrase during the recitation of the *Miranda* rights, that would not have prevented Manzueta from understanding his rights. According to Angelo Mimms' trial testimony, which this Court may consider in reviewing the denial of the suppression motions, see *United States v. Canieso*, 470 F.2d 1224, 1226 (2d Cir. 1972), and cases cited therein, Manzueta in fact spoke and understood English, although he concealed that fact from the police and agents.

finally tried to force his way out of the store, requiring Mimms to administer a bloody nose.* The discovery of the two additional counterfeit bills hidden in Manzueta's car was further powerful evidence of Manzueta's guilty knowledge, and also put the lie to his explanation that he had obtained the first bill from a "numbers man." ** Against this backdrop, Manzueta's false exculpatory statements to Mercado, although they tended to confirm Manzueta's guilty knowledge, were largely cumulative on that issue.

B. The Statements To The Assistant United States Attorney.

Manzueta's claim for suppression of his statements to the Assistant United States Attorney is similarly without merit, for at least two reasons.

First, the statements in question were background or "pedigree" statements not subject to the formal warning

* The brief history of the jury's deliberations indicates that the issue of guilty knowledge was not a difficult one, and to the extent that it was, Mimms' testimony was decisive. The jury retired at 11:45 a.m. on September 23, with Judge Bryan's suggestion that "the first thing you do is to take orders for lunch." (Tr. 340). At 2:25 p.m. the jury asked for the testimony of Mimms to be reread, and to see certain contemporaneous notes of Police Officer Garvey. The reading of Mimms' testimony was completed at 3:01 p.m., and the verdict returned at 3:30 p.m. (Tr. 343-45).

** The discovery of the bills in the car cannot be considered tainted by the statements to Mercado. Even assuming that the police officers would not have had probable cause to search the car solely on the basis of what Mimms told them, Manzueta's possession of the keys, and the car's location, the car would in any event, as a matter of routine Secret Service procedure, have been taken into custody by the Secret Service and subjected to a lawful inventory search. (Tr. 60-61). See *South Dakota v. Opperman*, 428 U.S. 364 (1976).

and waiver requirements of *Miranda*. Decisions subsequent to that case have made clear that the "questioning" and "interrogation" of which *Miranda* speaks, and which must cease upon a suspect's assertion of his rights, is questioning of a particular kind, namely, questioning about the crime in which the suspect is being held. Questioning on other subjects, including background information necessary for a determination of appropriate bail conditions, is not subject to the formal warning and waiver requirements. *United States v. Prewitt*, 553 F.2d 1082, 1085-86 (7th Cir. 1977); *United States v. Grant*, 549 F.2d 942, 945-47 (4th Cir.), *cert. denied*, — U.S. — (1977); *United States ex rel. Hines v. LaVallee*, 521 F.2d 1109 (2d Cir. 1975), *cert. denied*, 423 U.S. 1090 (1976); *United States v. Menichino*, 497 F.2d 935 (5th Cir. 1974); *Morrison v. United States*, 491 F.2d 344, 346-47 (8th Cir. 1974); *United States v. LaMonica*, 472 F.2d 580 (9th Cir. 1972); *Farley v. United States*, 381 F.2d 357, 358 (5th Cir.), *cert. denied*, 389 U.S. 942 (1967).

The *Hines* decision of this Court, upon which Judge Bryan relied below, is closely in point. There the defendant, who had been arrested for robbery and rape, was questioned about his family relations without having received any advice of rights at all. His answers proved incriminating when the victim later testified that the defendant had given her the same information at the time of the crime. In approving the admission of the statements at trial, this Court reasoned as follows:

"... A person's name, age, address, marital status and similar data, while usually non-incriminatory in character may in a particular context provide the missing link required to convict. On the other hand, information as to a suspect's identity is required immediately to enable the police to book and arraign the suspect and to permit the magistrate to determine the amount of bail to be fixed and whether persons claiming to be relatives should be allowed to confer with the suspect . . .

"Despite the breadth of the language used in *Miranda*, the Supreme Court was concerned with protecting the suspect against interrogation of an investigative nature rather than the obtaining of basic identifying data required for booking and arraignment. This view is confirmed by the most recent draft of The American Law Institute's Model Code of Pre-Arraignment Procedure § 140.8 (5) (April 1, 1974), which would limit *Miranda*—type safeguards to questioning designed to investigate crimes or the involvement of the arrested person or others in crimes' as distinguished from 'non-investigative questioning' . . . Accordingly we hold that since the answer furnished by Hines to the arresting officer in respect to his inquiry regarding Hines' marital status constituted merely basic identification required for booking purposes, its admission was not barred because of the officer's failure to satisfy *Miranda*'s warning-waiver procedure."

521 F.2d at 1112-13.*

The information elicited from Manzueta by the Assistant United States Attorney, and introduced by the Government at trial, was clearly "basic identification" information that was "required immediately to enable the [agents] to book and arraign the suspect and to permit the magistrate to determine the amount of bail to be fixed." *Hines* explicitly refers to "[a] person's name, age, address, marital status and similar data" as being the kinds of information that are outside the formal constraints of *Miranda*. *Id.* at 1112, 1113, n.2. "[S]imilar

* This Court in *Hines* cited but declined to follow the one Court of Appeals decision that appears to take a contrary view, *Proctor v. United States*, 404 F.2d 819 (D.C. Cir. 1968). See 521 F.2d at 1113.

data" surely encompasses the employment information that was also elicited from Manzueta. An "accused's employment" is one of the factors that a judicial officer setting bail in a federal case is specifically directed to consider under the governing statute. See 18 U.S.C. § 3146(b). The admissibility of the "pedigree" information that was introduced against Manzueta was, as Judge Bryan held, governed by *Hines*.*

Moreover, even if *Miranda* were fully applicable to the pedigree statements made in the United States Attorney's Office, it is clear that Manzueta voluntarily waived his rights with respect to these statements.

That such a waiver may occur even after an assertion of the right to an attorney is now clear. In appropriate circumstances, the courts have approved the admission of statements made after such an assertion, rejecting the view that any further questioning of a suspect is *per se* barred. See e.g., *Michigan v. Mosley*, 423 U.S. 96 (1975); *United States v. Grant*, *supra*; *United States v. Pheaster*, 544 F.2d 353, 367-68 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977); *United States v. Davis*, 527 F.2d

* Manzueta seeks to distinguish *Hines* on the ground that instead of being interrogated without warnings, he was advised of his rights and expressed a desire to have an attorney. In this respect Manzueta was in the same position as the defendants in several of the cases cited above. In *United States v. Menichino*, *supra*, for example, the defendant also asked to consult an attorney after being advised of his right to do so. He was told that he could do this after the "biographical", a process which included asking him for such information as his name, address, and social security number, but which did not include any interrogation about the crime. The Fifth Circuit ruled that statements taken during this process were admissible, partly on the grounds that the questions asked of the defendant were "biographical in nature," and not "about [his] involvement in criminal activity." *Id.* at 940-41. See also *United States v. Grant*, *supra*; *United States v. LaMonica*, *supra*; *United States v. Farley*, *supra* (all involving statements made after a request to consult an attorney).

1110, 1111 (9th Cir. 1975), *cert. denied*, 425 U.S. 983 (1976); *United States v. Marchildon*, 519 F.2d 337, 343 (8th Cir. 1975); *Biddy v. Diamond*, 516 F.2d 118, 122 (5th Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); *United States v. Hodge*, 487 F.2d 945, 947 (5th Cir. 1973); *United States v. Collins*, 462 F.2d 792 (2d Cir.), *cert. denied*, 409 U.S. 988 (1972).*

The leading Supreme Court case regarding the waiver of *Miranda* rights after their initial assertion is *Michigan v. Mosley*, *supra*. There the defendant, upon being advised of his rights, stated that he asserted his right to remain silent with respect to the two robberies for which he had been arrested. He was not questioned further about them, but two hours later was taken to a different room, again advised of his rights, and questioned about a different crime, a homicide. In rejecting his claim for suppression of statements made at the second interview, the Supreme Court held that *Miranda* does not require that all questioning cease after a defendant's assertion of his rights, but only that his "right to cut off questioning" be "scrupulously honored" by the questioners. 423 U.S. at 102-04. In resuming their questioning of Mosley, the police had not failed to honor his right to remain silent, for the "questioning of Mosley about an unrelated homicide was quite consistent with a reasonable interpretation of [his] earlier refusal to answer any questions about the robberies." *Id.* at 105.

* The Supreme Court decision in *Michigan v. Mosley*, *supra*, like the leading Second Circuit decision, *United States v. Collins*, *supra*, concerned an interrogation following assertion of the right to remain silent, rather than the right to an attorney, which is what Manzueta asserted. The Ninth Circuit in *United States v. Pheaster*, *supra*, however, expressly addressed this difference, and concluded that this same analysis applied to assertions of the right to an attorney and of the right to remain silent. 544 F.2d at 367. See also *United States v. Grant*, *supra*; *United States v. Marchildon*, *supra*; *Biddy v. Diamond*, *supra*; *United States v. Hodge*, *supra* (all findings effective waivers following assertions of the right to counsel).

This Court has taken a similar view. In *United States v. Collins*, *supra*, the defendant was arrested on one afternoon and gave a confession the following day at noon. In the interim he had been questioned, advised of his rights, and had asserted those rights no less than three times. He later sought to suppress the confession on the ground that *Miranda* barred all the interrogations subsequent to the first one. Rejecting this claim, the Court held that law enforcement officers may approach a suspect who has once asserted his right to remain silent, and may ask him to reconsider his refusal, provided that "reconsideration is urged in a careful, non-coercive manner at not too great length and in a context that a defendant's assertion of his right not to speak will be honored." 462 F.2d at 797. See also *Massimo v. United States*, 463 F.2d 1171, 1174 (2d Cir. 1972), *cert. denied*, 409 U.S. 1117 (1973) (reaffirming *Collins*).*

As required by *Mosley* and *Collins*, Manzueta's right to an attorney was "scrupulously honored," and the eliciting of biographical information was carried out "in a careful, non-coercive manner." Manzueta's rights were painstakingly made clear to him at the outset of the interview. After he expressed a desire to have an attorney he was carefully asked if he wished to proceed without that attorney to "some questions about [his] background."

* Prior to *Massimo* rehearing en banc of *Collins* was first granted and then denied. The order vacating the rehearing grant stated that "we are agreed that what *Miranda* requires is that 'interrogation must cease' until new and adequate warnings have been given and there is a reasonable basis for inferring that the suspect has changed his mind." 462 F.2d at 802. To the extent that this standard supplanted the language of the panel opinion in *Collins*, it was also satisfied here. New warnings could not be required because they had only just been given, and, as pointed out in text, the continued questioning of Manzueta was not really a resumption of questioning at all, but the taking-up of a non-investigative topic as to which the suspect had not in fact asserted his right to an attorney.

He was told that he could "pick and choose" the questions he wished to answer, stopping at any time. He answered unequivocally, "Yes, I'll answer those questions." He was questioned about his background only after it was clear that *as to that subject* he did *not* assert his right to have an attorney present. His assertion of his right, given a "reasonable interpretation," as required by *Michigan v. Mosley, supra* at 105, extended only to questioning about his involvement with the counterfeit bills. There was no such questioning after the attorney was mentioned.

Indeed, the fact that the continued questioning of Manzueta related to his background rather than criminal involvement renders this case *a fortiori* after *Mosley* and *Collins*, where the resumed interrogations related specifically to possible criminal involvement. Cf. *United States v. Grant, supra*, at 945-46; *United States v. Kaylor*, 491 F.2d 1127 (2d Cir. 1973) *remanded on other grounds*, 491 F.2d 1133 (2d Cir. 1973) (*en banc*), *judgment vacated on other grounds*, 418 U.S. 909 (1974) (both concerning statements made during "background information interview[s]" conducted after defendants had requested attorneys).*

* To be sure, there is no dearth of cases in which statements have been suppressed because they were elicited after the defendant asserted his right either to an attorney or to remain silent. See, e.g., *United States v. Massey*, 550 F.2d 300, 306-08 (5th Cir. 1977); *United States v. Kinsman*, 540 F.2d 1017, 1018-19 (9th Cir. 1976); *United States v. Womack*, 542 F.2d 1047, 1049-51 (9th Cir. 1976); *United States v. Blair*, 470 F.2d 331, 337-39 (5th Cir. 1972), *cert. denied*, 411 U.S. 908 (1973); *United States v. Crisp*, 435 F.2d 354, 356-57 (4th Cir. 1970), *cert. denied*, 402 U.S. 947 (1971); *United States v. Priest*, 409 F.2d 491, 492-93 (5th Cir. 1969). In each of these cases, however, the facts reveal an unambiguous assertion of rights that was directly disregarded by the interrogating officers. In none of them could it be said that

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The statements made in the United States Attorney's Office, and admitted against Manzueta at trial, were in any event harmless. As argued above, *see* Point I (A), the evidence against Manzueta, consisting primarily of Mimms' testimony, was "overwhelming" without consideration of any of the post-arrest statements. The background material elicited in the United States Attorney's Office was of particularly slight importance. Manzueta's age could hardly have been prejudicial. His address and the name of his wife established his ownership of the car, but this was never in question, nor could it have been with Manzueta possessing the registration and keys to the car at the time of his arrest. The fact that the car was a gypsy cab was apparent from its license plates and registration.* The fact that Manzueta had been driving the cab for about a year and a half tended, as the Government argued in its summation (Tr. 278, 282), to show an ability to speak English and also to recognize counterfeit money, but the incremental importance of this fact must be considered minimal. The date of the registration of the car as a gypsy cab could have been established by public record had Manzueta's statements been suppressed. It is clear that the suppression of this evidence would not have affected the verdict and that its admission, if error at all, was harmless beyond a reasonable doubt.

the defendant's assertion of his rights was "scrupulously honored," or that "reconsideration [was] urged in a careful, non-coercive manner." Moreover, all of these cases entail continued questioning about criminal involvement. None involve the specific situation presented here: that of a defendant asserting his rights and then waiving them as to background only.

* Agent Horton testified that he knew the car was a "gypsy cab" because of its "livery license plates." (Tr. 59).

POINT II**Suppression Of Manzueta's Statements To Agent Simon Was Never Sought In The District Court, And Would Not Have Been Warranted In Any Case.**

Manzueta argues that his statements to Agent Simon should have been suppressed because of "unnecessary delay" in bringing him before a Magistrate. See Fed. R. Crim. P. 5(a); *Mallory v. United States*, 354 U.S. 449 (1957); *McNabb v. United States*, 318 U.S. 332 (1943). Manzueta never raised this below, although there was ample opportunity for him to do so.* It is therefore waived and cannot be raised for the first time on appeal. See Fed. R. Crim. P. 12(f); *United States v. Di Stefano*, 555 F.2d 1094, 1100 & n. 5 (2d Cir. 1977); *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir.), cert. denied, 431 U.S. 959 (1977).

Even if the Court were to entertain a claim based on "unnecessary delay," that claim must be rejected on its

* Even giving Manzueta's claims in the District Court the most liberal construction, they can nowhere be found to include a claim based on delay. Manzueta made no written motions of any kind. At all points in the record where his attorney orally made or discussed his suppression motions, he referred only to *Miranda v. Arizona*. (Tr. 2, 6, 11, 85-87). The sole reference by counsel even to the fact that there had been some delay was made in connection, not with the statements to Agent Simon, but with the statements in the Assistant United States Attorney's Office. Counsel argued that since Manzueta had, by the time of the latter statements, been in custody for two days, his stated desire to have a attorney should have been more completely respected. (Tr. 87). This reference cannot fairly be understood as a claim for suppression based on delay. It certainly was not so understood either by the Government or by the District Judge, there being no reference in either the Government's argument or the District Judge's rulings on the suppression motions to any question of delay. (Tr. 87-94).

merits. Although the question of delay was never in issue in the District Court, the following appears from the record to be the sequence of relevant events:

Agent Horton arrived at the 32nd precinct station house to take Manzueta into custody at "approximately two or three o'clock" on Saturday, July 5. (Tr. 70). They arrived at the Secret Service Field Office at about 5:00 p.m. (Tr. 58). The Secret Service's processing was completed at this time except that no information could be obtained from Manzueta himself because no Spanish speaking Secret Service Agent was available. (Tr. 58, 62, 220-21). Manzueta was then lodged at the Federal House of Detention for the remainder of the weekend. On Monday morning he was promptly picked up and taken to the Secret Service Field Office for the interview with Agent Simon. This took place at about 10:45 a.m. (Tr. 66, 222).

These events reveal no "unnecessary delay," even assuming that the *McNabb-Mallory* rule on which Manzueta relies is still applicable. Almost all of the time between Manzueta's arrest and his questioning by Agent Simon consisted of Saturday afternoon and Sunday of the July 4th weekend. It is clear that the detaining of an arrested suspect during such a period, when no magistrate is available, does not constitute "unnecessary delay." See *United States v. Ortega*, 471 F.2d 1350, 1362 (2d Cir. 1972), *cert. denied*, 411 U.S. 948 (1973) (Sunday at 2:30 a.m. to Monday at 1:30 p.m., Monday being Jewish holiday); *United States v. Collins*, 462 F.2d 792, 795-96 (2d Cir. 1972) (overnight); *United States v. Marrero*, 450 F.2d 373, 376 (2d Cir.), *cert. denied*, 405 U.S. 933 (1971) (overnight).

The remaining delay, from 9:00 a.m. to 10:45 a.m. on Monday, is accounted for by the transportation of Manzueta from the House of Detention and by the Simon interview itself. That interview, which was the only

Secret Service interview of Manzueta, and which took place on Monday only because of the unavailability of a Spanish speaking agent on Saturday evening, was part of the Secret Service's routine processing of an arrested suspect. This Court has repeatedly held that periods of delay necessary for such routine processing, including interviews of the suspect, do not constitute "unnecessary delay." See *United States v. Barrera*, 436 F.2d 333, 338 (2d Cir.), cert. denied, 416 U.S. 940 (1973) (more than six hours); *United States v. Johnson*, 467 F.2d 630, 636 (2d Cir. 1972), cert. denied, 410 U.S. 932 (1973) (two hours and forty-five minutes); *United States v. Collins*, supra, at 795-96 (three hours and fifteen minutes).

There was certainly no coercion of Manzueta nor any other improper use of the period of delay. As the Court observed in *United States v. Johnson*, supra at 636, "the focal question is not how much time passed but how the time was used." See also *United States v. Marrero*, supra at 376. What was said in *Marrero* is equally apt here: "There is no evidence at all of any systematic or constant interrogation during a period of intentional delay."

It appears, moreover, that the *McNabb-Mallory* rule upon which Manzueta relies has been amended by Congress in 18 U.S.C. § 3501, which provides that post-arrest statements of a defendant are admissible if they are "voluntary," and that delay prior to the taking of a statement is only one factor affecting its voluntariness. See *United States v. Ortega*, supra at 1362; *United States v. Collins*, supra at 796; *United States v. Marrero*, supra at 377.*

* Although the cited cases strongly intimate the view that § 3501 has completely supplanted the *McNabb-Mallory* rule, the point has not been squarely decided by this Court. See *United States v. Duvall*, 537 F.2d 15, 23 n. 9 (2d Cir. 1976). Several

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In light of the very reasonable period of delay in this case, the absence of any evidence of coercion, Agent Simon's scrupulous compliance with *Miranda*, to the point of securing a signed waiver of rights from Manzueta,* and finally the fact that the statements in question were exculpatory, there can be no colorable claim of "involuntariness" under § 3501. Indeed, Manzueta makes no such claim. (Brief for Appellant at 15.)

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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other circuits have more clearly taken the view that § 3501 has changed the role of delay to that of only one factor affecting voluntariness. *United States v. Mayes*, 552 F.2d 729, 733-34 (6th Cir. 1977); *United States v. Shoemaker*, 542 F.2d 561, 563 (10th Cir.), cert. denied, 429 U.S. 1004 (1976); *United States v. Mandley*, 502 F.2d 1103, 1105 (9th Cir. 1974); *United States v. Halbert*, 436 F.2d 1226, 1237 (9th Cir. 1970).

* This fact in itself provides an alternative ground on which to reject any suppression claim based on delay. In *United States v. Duvall*, *supra* at 23 n. 9, Judge Friendly pointed with approval to the holdings of several other circuits that a voluntary and effective waiver of *Miranda* rights, such as clearly occurred here, also operates as a waiver of claims based on delay up to that point.

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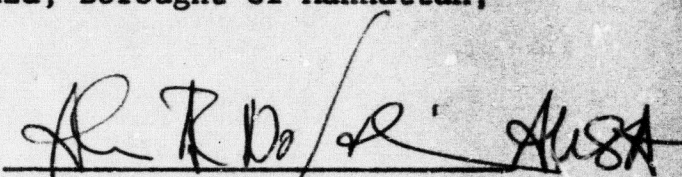
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deposes and says that he is employed in the office
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That on the 1st day of March, 1978
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by placing the same in a properly postpaid franked
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Alan R. Naftalis
Assistant United States Attorney

Sworn to before me this

1st. day of March, 1978



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